



## THE CONFLICT OF JURISDICTION BETWEEN THE STATE LEGISLATURE AND THE CON- GRESS OF THE UNITED STATES IN THE ENACTMENT OF WORKMEN'S COMPENSA- TION ACTS BY THE STATES AND THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

This question will be discussed in the broadest form, viz., with respect to the enactment by the states of the United States, of laws creating a scheme of social insurance, compulsory in form, that is to say, insurance against sickness, accidents, invalidity, old-age pensions, out-of-work, and pensions for wives of workmen during the period (8 weeks or more) of "confinement."

### INTRODUCTION

The compensation acts of thirty-one states now in operation<sup>1</sup> provide limited universal compensation for injured workmen, or dependents of workmen injured in the due course (or arising out) of their employment. These acts provide for the payment of compensation for injuries in most states to all public employees, and all employees engaged in employments where four, five, six or more are regularly employed, or to employees in a large list of the so-called hazardous employments.

That workmen's compensation acts may further provide compulsory insurance against sickness, invalidity, old-age, out-of-work, and confinement of wives of workmen, limited in amounts to conserve the public purpose involved, follows from lines of reasoning which justify compulsory state insurance against the loss of wages, arising out of physical injuries to employees. Many acts of the state legislatures have been passed recently providing mothers' pensions, which have been sustained by the courts.<sup>2</sup>

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<sup>1</sup> 10 N. C. C. A. 1-69, note under *Western Indemnity Co. v. Pillsbury*.

<sup>2</sup> Bulletin of U. S. Bureau of Labor Statistics, No. 186 (for 1915), pp. 305, 340, 375, 378, 393, 398, 418, 435; *Debrot v. Marion County*, 145 N. W. 467 (Supreme Court of Iowa, February 19th, 1914).

## I

The question proposed for discussion is: May workmen's compensation acts be made to apply to employees and employers engaged in *interstate* and *foreign* commerce, for whom a rule of liability or method of compensation has not been created by Congress? And, specifically speaking, can employers engaged in interstate commerce operating in New York state, be compelled to compensate their employees injured in New York state, in accordance with the provision of the New York Workmen's Compensation Act, notwithstanding the existence of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), or even notwithstanding the existence of the Federal Employers' Liability Act of 1906 (34 Stat. L. 232), which applied to "every common carrier" engaged in interstate or foreign commerce, while the former act applies only to carrier by railroad. *In other words, has Congress, in enacting said employers' liability acts, enacted workmen's compensation acts respecting workmen employed by interstate railways, or by common carriers engaged in interstate or foreign commerce?*

The New York Compensation Act of New York respecting employers and employees engaged in *interstate* and *foreign* commerce provides, Sec. 114:

"Sec. 114. INTERSTATE COMMERCE. The provisions of this chapter shall apply to employers and employees engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

The Federal Employers' Liability Act (H. R. 20310, approved April 22, 1908), Sec. 2, provides:

"That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable

in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

This act modified the rigor of the common law defenses, abrogating the common law defenses of the "fellow-servant rule," introducing the doctrine of "comparative negligence" and abolishing the common law defense of "assumed risk" in certain cases. One could well say that the effect of the Federal Employers' Liability Act of 1906, and that of 1908 likewise, is to diminish the effectiveness of the three common law defenses by one-half or more, and to enlarge the frequency of recoveries, for injured workmen affected, by twenty per cent.<sup>3</sup>

The offending section of the Federal Employers' Liability Act of June 11, 1906,<sup>4</sup> which was held unconstitutional in *Howard, admx. v. Ill. Cent. R. Co.*, 207 U. S. 463, etc., reads as follows:—

"Sec. 1. That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for the next of kin dependent upon him,—for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

<sup>3</sup> Economic Basis of Workmen's Compensation Acts, Michigan Law Review, Vol. X, No. 3, March, 1912.

<sup>4</sup> 34 Stat. L. 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891.

Paragraph "2" of the syllabus reads:

"A regulation of *intrastate* as well as of *interstate* commerce, and therefore *one beyond the power of Congress* to enact, is made by the provision of the Employers' Liability Act of June 11, 1906 (34 Stat. L. 232, chap. 3073 U. S. Comp. Stat. Supp. 1907, p. 891), that 'every common carrier engaged in trade or commerce' in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of 'any of its employees' which may result from the negligence of 'any of its officers, agents or employees.' "

And at page 504 the court by J. White says:

"Concluding as we do, that the statute, while it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are, therefore, affirmed."

J. Miller of the Supreme Court of New York in *Jensen v. Southern Pacific Company*, 215 N. Y. —, construing Sec. 114 of the New York Workmen's Compensation Act in its relation to or conflict with Sec. 2 of the Federal Employers' Liability Act of 1908 and that of 1906 (declared unconstitutional by the Supreme Court of the United States),<sup>5</sup> said:

"It is next claimed that the statute was not intended to apply to employment in interstate or foreign commerce and that in case of doubt that construction should be adopted, for otherwise it would offend against the commerce clause of the Federal Constitution by imposing a burden upon such commerce. The latter claim will be noticed first. The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until Congress by entering the field excludes state action. (*Sherlock v. Alling*, 93 U. S. 99; *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455; *Reid v. Colorado*, 187 U. S. 137; *Simpson*

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<sup>5</sup> *Howard v. Ill. Central R. R. Co.*, 207 U. S. 463-541.

v. Shepard, 230 U. S. 352; Erie R. R. Co. v. Williams, 233 U. S. 685).

Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States' is meaningless. The legislature evidently intended to regulate as far as it had the power, all employments within the state of the kinds enumerated. The earlier sections are in terms of general application, and section 114, which is headed 'Interstate Commerce,' is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it is provided that the act should apply to interstate or foreign commerce, 'for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States,' only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States. *But it is said that Congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule 'may be established,' etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words 'may be' should be construed in sense of 'shall be.'*

One other question in respect to the application of the act remains to be considered. It is said that the appellant is a carrier by railroad, and that, therefore, the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as it appears, may not even indirectly be related to transportation by railroad, certainly not by any particular line of railroad. It is insignificant that the earlier federal statute of June 11, 1906 (34 Stat. L. 232), applied to 'every common carrier' engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a rail-

road corporation, and not otherwise—to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The federal act provides a rule of liability of carriers by railroad for injury or death 'resulting in whole or in part \* \* \* by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' The words 'boats' and 'wharves' may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad.

*Our conclusion, therefore, is that the employment in which the deceased was engaged was not governed by the federal statute, that the Workmen's Compensation Act applied to it, and that the latter act is not violative of the Federal Constitution for attempting directly to regulate or impose a tax or burden on interstate or foreign commerce."*

In other words the Supreme Court of the United States declared the Federal Employers' Liability Act of 1906 unconstitutional because its provisions applied both to employees engaged wholly in *intrastate* commerce and to employees engaged in *interstate* commerce. The court held by a substantial majority that Congress has only the power to deal with the question in so far as employees are engaged in interstate commerce.

It is now contended that the Congress of the United States, by the enactment of the Federal Employers' Liability Act of 1908, undertook to legislate and has so legislated on the same subject matter, as was legislated upon by the legislature of the state of New York when it enacted the New York Workmen's Compensation Act, and that Congress by the enactment of the Act of 1908 takes all cases of injuries to workmen employed by railroads engaged in interstate commerce out of the operation of the New York Workmen's Compensation Act and out of the jurisdiction of the state administrative boards of the state of New York, created to administer the New York Workmen's Compensation Act.<sup>6</sup>

The decision of the Supreme Court of New York state holds that this is not the case, and that the provisions of the New York Compensation Act do apply to employees injured in the state of New York, notwithstanding that said employees are employees of railways, engaged in interstate or foreign commerce.

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<sup>6</sup> *Jensen v. Southern Pacific Company*, 9 N. C. C. A., note p. 307.

We shall proceed to show that the Congress of the United States, by the enactment of the Federal Employers' Liability Act of 1908, did not legislate on the same subject matter as that covered by the New York Workmen's Compensation Act. That the latter is based entirely upon different *grounds* and *purposes* from that which underlie the Federal Employers' Liability Act.

Stated otherwise our problem is:

The Southern Pacific Company, which was the owner of the steamship that the plaintiff was assisting in unloading, made the defense that no recovery could be had under the compensation act for the reason that the liability was governed by the Federal Employers' Liability Act, but the court held that there was no evidence that the steamer was being used in connection with the railroad and that the federal act did not attempt to govern or include the field of liability of carriers by water to their employees.

Suppose that the steamer in question was operated in connection with the defendant company. Would the defense of the railroad company be a good defense? We undertake to show that it would not be a good defense.

## II

### ANALYSIS OF THE RELATIONSHIP CREATED BETWEEN EMPLOYER AND EMPLOYEE AS A RESULT OF THE ENACTMENT OF AN INDUSTRIAL INSURANCE ACT OF WORKMEN

The distinction between the principles of law applicable on the one hand to the common law of torts and employers' liability acts, and on the other hand those applicable to industrial insurance or workmen's compensation may be stated as follows:

The body of law involved in the law of torts and employers' liability statutes pertains entirely to the redress of private wrongs. In such instances liability results in the payment of damages to the employee, intended to be commensurate with and to reimburse him for the injury suffered. Such law has for its sole object and end, the regulating of private rights, that is, the readjustment of relationship between individuals, to reproduce the parity presumptively existing between them.

On the other hand, the obligations of industrial insurance and workmen's compensation accrue from contingencies not dependent upon or within the control of the parties, and thus have no

relationship whatever to the conduct of the parties; hence these obligations are not based upon wrongs. It follows then that they must pertain to the subject of government regulations, and are in the nature of economic provisions taking the form of indirect taxation levied to regulate occupations, for on what other basis would the government be justified in writing into the labor contract against the will of the parties, an insurance policy? Were this not so, industrial insurance or workmen's compensation would be free from the standpoint of both the employee and the employer, without basis of justice or equity, for the theory of such laws is that compensation is not to be commensurate with injury but is to be based upon wages, thus substituting for the former obligations based upon tort, which offer damages commensurate with injury, a purely arbitrary sum. Such a scheme can have no relation to the adjustment of private wrongs. If it be justifiable it must be on the sociological theory of the right of the state to *levy a tax for the purpose of protecting from an economic standpoint, the community as a whole.*

It therefore follows that in our analysis of constitutional limitations we cannot look for any analogy in the decisions which have to do with the regulation of the private relations between the employer and his employees. However, for this purpose, there have been brought into the earlier stages of the discussions on this subject cases which hold a statute of Pennsylvania constitutional which abolished the doctrine of respondent superior in the cases of persons on or near railroads and not in the employ of the railroad company;<sup>7</sup> cases which hold statutes constitutional that make railroads liable for fires set by engines though without fault;<sup>8</sup> cases holding a statute constitutional making a railroad company liable for injury though without fault;<sup>9</sup> or the common illustrations, as the liability of a master for the acts of his servant, or the ancient law of deodands, or the liability of the husband for the tort of his wife. All of the common law or statutory duties defined in these decisions relate to the preservation of *private rights.*

Our problem is therefore the following: *Has the state the power to regulate its industries for the purpose of protecting the health, safety and general welfare of the community, by levying*

<sup>7</sup>See *Kirby v. Pennsylvania R. Co.*, 76 Pa. 506, and *Martin v. Pittsburgh & L. E. R. Co.*, 203 U. S. 284.

<sup>8</sup>See *St. L. & S. F. R. R. Co. v. Mathews*, 165 U. S. 1.

<sup>9</sup>See *C. R. I. & P. R. R. v. Zernicke*, 183 U. S. 582.



*a tax in the form of an insurance obligation upon such industries, for the benefit of all employees injured while employed in the same?*

And assuming that the state has the right to levy such a tax, may it in appropriating private rights for the benefit of the general welfare, take, as a part of the same, from the employee the right which belongs to him, to compensate himself for his personal injury caused by the default of his employer, by recovering damages from the latter?

### III

#### NATURE OF THE REMEDY PROVIDED BY THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

The purpose and only effect of the enactment by the Congress of the Federal Employers' Liability Act of 1908 is to abolish entirely the "fellow-servant rule," and to a limited extent the effectiveness of the common law defenses of the "assumed risk" in certain cases, and that of "contributory negligence," by substituting therefor the doctrine of "comparative negligence." The act left the cause of action of the employee of a railroad company engaged in interstate trade based upon the default or negligence of his employer, his agents and his employees; and cut down the employer's defenses as described, thereby increasing such an employer's chances of recovery heretofore existing by not to exceed twenty per cent.<sup>10</sup> Recovery under the federal act is based upon a *tort* of which the railroad company is charged as being guilty.

The New York Workmen's Compensation Act makes it compulsory upon all employers described in forty-two classes of employments to pay the universal compensation provided for in the act on account of any injuries to or death of employees engaged in said employments, without regard to any fault of either employer or employee, excepting the wilful fault of either, to such injured employees, or the dependents thereof in case of death.

Such employers are compelled to secure such compensation to their employees in one of three ways:

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<sup>10</sup> Economic Basis of Compulsory Insurance, Michigan Law Review, Vol. X, No. 3, March, 1912. Where millions of accidents are considered, the causes of the accidents are attributable to fellow-servants in 5.28% of the cases.

1. "By insuring and keeping insured the payment of such compensation in the state insurance fund," or

2. "By insuring and keeping insured the payment of such compensation with firms, persons or corporations authorized to transact the business of workmen's compensation insurance in the state of New York" or

3. "By furnishing satisfactory proof to the commission of his ability to pay such compensation for himself."

The principle involved in raising the fund provided by the New York Workmen's Compensation Act from which shall be paid the compensation to the injured, is based primarily upon raising a state insurance fund by levying an insurance premium of the nature of a tax upon all employers covered by the act. This in substance is true, whether the employer pursues plans 1, 2, or 3 cited above.

The existence of the *public purpose* which justifies the state in taxing employers in this manner consists in the fact that, if such a tax were not levied, many minor children of tender years would be made dependent upon public charity and be prevented from attending school long enough to receive such training as would enable them to support themselves, and wives and injured persons would also be made dependent upon public charity.<sup>11</sup>

The compensations made and provided by the New York Compensation Act are limited (as they are in all other compensation acts) to such amounts as conserve the *public purpose*, to-wit:—to prevent the dependents of injured and killed workmen from becoming charges and to keep their minor dependent children of tender years in school long enough to give them such training as will render them self-supporting.

*All* injured workmen and *all* dependents of killed workmen are compensated without regard to the fault of either the employer or employees excepting in case of *wilful and malicious* fault of either which takes each party out of the statute. No such basis exists for the enactment of the Federal Employers' Liability Act of 1908. Less than twenty-five per cent of injured workmen recover under it.<sup>12</sup> The injured worker is supposed to recover complete compensation for his injury in case he has a *good cause* of action.

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<sup>11</sup> 10 N. C. C. A. 7, note under *Western Indemnity Co. v. Pillsbury*.

<sup>12</sup> Economic Basis of Compulsory Industrial Insurance, Michigan Law Review, Vol. X, No. 3, March, 1912.

The causes of fifty to fifty-five per cent of all injuries is due to the inevitable risk of the business<sup>12</sup> and can in no way be traced to the fault or negligence of the employer or his employees. But all of these are compensated under the New York act (and all compensation acts). Whereas, the Federal Employers' Liability Act does not contemplate the recovery of compensation for any of them. It only contemplates a recovery when the negligence or default of the employer, his agents or employees, can be proven, which can be done in less than thirty per cent of the cases. And even in these cases (30%) the plaintiff's chances of recovery are still further reduced in those cases where the plaintiff assumed the risk, or his own negligence contributed to the cause of the accident.<sup>13</sup>

The Federal Employers' Liability Act as in the case with all employers' liability acts pertains entirely to the redress of private wrongs and has for its sole object and end the regulating of private rights. But the obligations of industrial insurance and workmen's compensation accrue from contingencies not dependent upon or within the control of the parties and therefore have no relationship whatever to the conduct of the parties and hence are not based upon wrongs. It follows that they pertain to the subject of government regulations and are economic provisions taking the form of indirect taxation.

Hence no public purpose is pretended to be conserved by the Federal Employers' Liability Act of 1908, as is the case with the New York Workmen's Compensation Act.

Admitting, therefore, the doctrine that in case Congress has enacted a law, the subject matter of which deals with the regulations of interstate and foreign commerce, by providing industrial insurance for the use and benefit of injured workmen and the dependents of killed workmen, engaged in the same, such subject matter would be removed from the possibility of legislation thereon by any state legislation; it follows from what has been shown above, that Congress by enacting the Federal Employers' Liability Act *did not* legislate, or attempt to legislate on the subject matter of workmen's compensation acts, or that of industrial insurance.

That a public purpose, such as is required to exist before the state is authorized to provide insurance, limited in amount, against sickness, invalidity, old-age, for the benefit of injured

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<sup>13</sup> Federal Employers' Liability Act, Secs. 3 & 4.

workmen and dependents of killed workmen, by compulsory taxation, direct or indirect, does not exist in the cases just named, may be shown, as has been shown in the case of insurance against bodily injuries by thirty-one state compensation acts already enacted.<sup>14</sup> Space does not permit an analytical proof of this assertion.<sup>15</sup>

Mr. Roberts in his note to *Jensen v. Southern Pacific Company*<sup>16</sup> says:

"Both statutes cannot apply in the same field and therefore both cannot cover the same injury and the question of the applicability of the two laws certainly should not turn upon the further question of the existence or absence of negligence, for if an employee is injured through the violation of the Federal Safety Appliance Act no negligence need be shown. Obviously Congress by this statute intended to cover the entire field of the liability of interstate railroads to employees engaged in interstate commerce."

The conclusion which Mr. Roberts here states does not follow. The Federal Safety Appliance Act simply makes the failure to provide the "appliances" defined therein "negligence *per se*" or defines a new tort upon the conviction of which the guilty company may be fined and recovery of damages had, in the same manner as state statutes which make it a tort for a railroad company to fail to properly "block" frogs where the courts held that such failure is negligence *per se*.<sup>17</sup>

The fallacy in Mr. Roberts' argument lies in the assumption that Congress legislated on the subject matter of workmen's compensation acts when it enacted the Federal Employers' Liability Act.

Additional proof of the correctness of the writer's position is the following:

Judge Foran of the Court of Common Pleas of Cleveland, Ohio, in his opinion of July 9, 1915, in the cases: *John Vato v. The River Terminal and Railway Company*, No. 140-141, etc., said:

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<sup>14</sup> 10 N. C. C. A. 1, note.

<sup>15</sup> Bulletin of U. S. Bureau of Labor Statistics No. 186 (for 1915), pp. 305, 308, 312, 340, 375, 378, 393, 398, 418, 435; *Debrot v. Marion County*, 145 N. W. 467 (Supreme Court of Iowa, Feb. 19, 1914).

<sup>16</sup> 9 N. C. C. A. 30.

<sup>17</sup> *Narramore v. Cleveland C. C. & St. L. R. Co.*, 37 C. C. A. Syll. pp. 3, 499 and 500-1; *Railway Co. v. Van Horne*, 16 C. C. A. 182.

"If the driver of a lumber wagon, in the course of his master's business, is negligently injured by a railroad company while crossing its tracks upon a public highway, he may recover from the wrong-doer, notwithstanding he has recovered compensation or has been awarded compensation by the state industrial commission from the state insurance fund, for the injury."

The enactment of laws which provide social insurance, limiting the amounts to be paid, so as to conform to the public purposes indicated, by both state and federal governments, is but the further extension of the Christian conception of the state. The establishment of such laws is one of the most effective methods for conserving the unit of the state, the family of the working classes. Such protection conserves the physical, potential power of the state by means of which the state must stand or fall when the state is attacked by armed enemies.

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TOLEDO, OHIO, February 12, 1916.